(1)

Supreme Court, U.S.
FILED

02 949 DEC 17 2002

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JESSE ROBLES MOREJON,

Petitioner,

v.

RON GOETHALS,
DIRECTOR OF COMMUNITY SUPERVISION
AND CORRECTIONS DEPARTMENT OF
DALLAS COUNTY, TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTION PRESENTED

WHEN A COURT OF APPEALS JUDGE ENTERS AN ORDER DENYING A CERTIFICATE OF APPEALABILITY IN A CASE IN WHICH THE PETITIONER PRESENTED EVIDENCE OF THE INVOLUNTARINESS OF HIS GUILTY PLEA, INSTEAD OF RELYING SOLELY ON A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE, MUST THE ORDER AFFIRMATIVELY SHOW THAT THE EVIDENCE WHICH PREPONDERATES AGAINST THE CONCLUSION OF VOLUNTARINESS WAS ALSO CONSIDERED IN DENYING THE CERTIFICATE.

LIST OF PARTIES

Interested parties not listed in the caption are petitioner's trial counsel, Alexander Fitzenhagen; Robert M. Berry, who was petitioner's counsel at the motion for new trial hearing; Respondent by and through the Criminal District Attorney of Dallas County, Texas, Bill Hill, and Karen Wise, Rick Jackson, Clark Kennington, and Peter L. Harlan, Dallas County Assistant District Attorneys.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Order of United States Fifth Circuit Court of Appeals Judge Jerry E. Smith denying the certificate of appealability is not reported and is reproduced in Appendix A. The Order of the United States District Court Judge adopting the Magistrate's Findings, Conclusions and Recommendation of the United States Magistrate Judge was not reported and appears in Appendix B. The Findings, Conclusions and Recommendations of the United States Magistrate Judge was not reported and appears at Appendix C.

The Texas Court of Criminal Appeals "postcard" refusing the Petition for Discretionary Review of the Texas Fifth Court of Appeals Opinion appears in Appendix D.

The Opinion of the Court of Appeals for the Fifth District of Texas denying the appeal from the district court was not reported and appears in Appendix E. There was no formal opinion from the Texas district court judge denying the application for writ of habeas corpus. However, excerpts from the Reporter's Record in that court containing the judge's statement on denying the application for writ of habeas corpus appear in Appendix F.

JURISDICTION

The order of United States Fifth Circuit Court of Appeals Judge Jerry E. Smith denying the certificate of appealability issued as the mandate and was entered

September 18, 2002. (Appendix A). The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right .... to have the Assistance of Counsel for his defence."

28 U.S.C. §1254 provides in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. §2254(a) provides, in relevant part:

> The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. §2253 provides, in relevant part:

> (a) In a habeas corpus proceeding or a proceeding under §2299 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held....

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by State court. . . or

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Petitioner seeks review of the order of a judge of the Fifth Circuit Court of Appeals denying to him a certificate of appealability.

Petitioner originally plead guilty in the Texas state district court to a charge of sexual assault. A motion for new trial was filed on petitioner's behalf, a hearing was held on the question of the voluntariness of the plea, and the motion was denied. Thereafter an application for writ of habeas corpus was filed alleging that petitioner's guilty plea was not freely and voluntarily made, because of the ineffective assistance of counsel through counsel's failure to evaluate the strength of the state's case, failure to explore potential defenses and failure to adequately advise petitioner regarding how to plead. The application was denied after hearing. The matter was then appealed to the intermediate Texas Court of Appeals which court affirmed the trial court decision in an unpublished written opinion, and a petition for discretionary review was then sought from the Texas Court of Criminal Appeals, which petition was refused without written opinion.

Petitioner then filed an application for a writ of habeas corpus on the same ground in the United States District Court for the Northern District of Texas. The matter was referred to the Magistrate Judge who, without a hearing, then prepared written Findings, Conclusions and Recommendation denying relief, which Recommendation was adopted by the District Court Judge. Petitioner was thereafter denied a certificate of appealability by the district court and, subsequently, by a judge of the United States Court of Appeals.

REASON FOR GRANTING THE PETITION

THIS PETITION INVOKES THE COURT'S SUPERVISORY POWERS OVER THE COURTS OF APPEAL AND DISTRICT COURTS TO ENSURE THAT IN DENYING A CERTIFICATE OF APPEALABILITY APPROPRIATE DEFERENCE IS PAID TO *SLACK v. McDANIEL*, 529 U.S. 473, BY REQUIRING THAT THE COURT SET FORTH IN ITS ORDER ALL THE EVIDENCE BEFORE IT IN CONCLUDING THAT REASONABLE JURISTS WOULD NOT FIND THE ASSESSMENT OF THE CONSTITUTIONAL CLAIMS DEBATABLE OR WRONG.

ARGUMENT

STANDARD FOR GRANTING THE CERTIFICATE

Where a habeas corpus petitioner seeks to initiate an appeal from the denial of his petition in the district court, he must obtain a certificate of appealability by making a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253. "Substantial showing" means that the petitioner must demonstrate that reasonable jurists would find the district court's assess-

ment of the constitutional claims debatable or wrong. *Slack v. McDaniel,* 529 U.S. 473, 484.

ANALYSIS

In the court of appeals' judge's order denying the certificate of appealability and rejecting petitioner's allegation that counsel failed to evaluate the strength of the state's case and failed to explore potential defenses, the judge relied on the fact that the state would drop the charges if the complainant, who could not be located until the night before trial, did not appear to testify; that the state was agreeable to a continuance if she appeared; and that the allegation that no guidance was provided regarding whether to accept or reject the plea offer was refuted by petitioner's statements made during the guilty plea. What the order failed to show was the substantial amount of evidence presented supporting petitioner's position. This petition does not ask this Court to weigh or review the following evidence, except is so far as it is necessary for the appropriate consideration of whether or not the court order denying a certificate of appealability may review only the evidence which supports the conclusion under review or must the reviewing court also consider in its opinion or order such contrary evidence as appears of record which preponderates toward granting the certificate, and then provide in its opinion an analysis of all these factors to insure that the appropriate deference is paid to all the evidence.

The uncontradicted evidence not set forth in the judge's order is that trial counsel was retained solely because he agreed to try the case on a plea of not guilty;

that the attorney who referred petitioner to trial counsel for trial had on the day of the plea proceedings received on his voice mail a message from petitioner stating that he was at the courthouse and that trial counsel was scaring him and trying to make him plead guilty; that he returned the call to petitioner's home and left a recorded message for him not to plead guilty and left a message on trial counsel's voice mail for him to not force petitioner to plead guilty. Evidence also showed that the alleged date of the offense was a day *after* the petitioner had reported to the police department that his daughter, the complainant, who had been living at his home, was in a missing person status from home (a copy of this missing person police report was introduced into the record), and she could not have been present for the offense to occur. This fact was made known to trial counsel on the day of and prior to the plea of guilty; that prior to the complainant/daughter making the sexual assault allegation to the investigators, she and the petitioner had engaged in a physical fight over the fact that the petitioner disapproved of the late hours she was spending with her boyfriend, an assault for which the petitioner was arrested and jailed (this police report was also introduced into evidence) and which assault might form the basis for a subsequent false allegation of sexual assault; the affidavits of two family friends, one of whom had known the complainant for four years and had a good relationship with her and believed that if there had been a problem between her and petitioner she would have discussed it with him, and a second family friend for 20 years who visited in the complainant's home five or six days a week who had observed only a healthy father-daughter relationship between the two parties.

Also introduced was the potential impeachment affidavit of Mrs. Solis who had known the complainant for the preceding four years and in whose home the complainant visited regularly. When the complainant began to visit without her father and was asked why her father wasn't coming with her, she stated that she was upset because her father had spanked her after being caught in the car with her boyfriend; when asked if there was anything else the matter, she stated no, that was the whole thing.

Barefoot v. Estelle, 463 U.S. 880, 893, in discussing a certificate of probable cause, the precursor to the current certificate of appealability, stated that the certificate is "the primary means of separating meritorious from frivolous appeals," and noted that the petitioner need not show he would prevail on the merits, because he had already failed in that endeavor, but "that a court *could* resolve the issue [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.' " *Id.,* n. 4. Thus, the "reasonable jurist" standard recognized in *Slack,* infra, to obtain the certificate is not high, nor could it be since the burden of proof to prevail on the writ itself is by a preponderance of the evidence. The burden to prevail on a claim of ineffective assistance of counsel, after establishing the primary error of counsel, is "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 694. The "reasonable jurist" standard must be of less weight than these standards or the issue could not be litigated on appeal. Because the burden is not great, it is essential that all the evidence be considered in deter-

mining whether or not to issue the certificate, and this can only be assured by the requirement that an analysis of all the evidence be contained in the order denying a certificate of appealability.

CONCLUSION

For the foregoing reason petitioner respectfully prays that the petition for a writ of certiorari be granted to review the order and mandate of Judge Smith, because it is essential to the proper functioning of the habeas curpus review process that access to the court of appeals be readily available, unless it clearly appears after a review of all the evidence on the record that an applicant does not deserve encouragement to proceed further.

Respectfully submitted,

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APPENDIX A

[Filed SEP 18 2002]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10001
USDC No. 3:01-CV-1535-G

JESSE ROBLES MOREJON,
Petitioner-Appellant,

versus

RON GOETHALS, Director of Community Supervision and Corrections Department of Dallas County, Texas,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ORDER:

Jesse Robles Morejon pleaded guilty to Texas charges of sexual assault pursuant to a plea agreement which provided for deferred adjudication. Morejon was sentenced to ten years' community supervision, 150 days in jail, and a $500 fine. Having exhausted his state remedies, Morejon filed a 28 U.S.C. §2254 petition challenging the voluntariness of his guilty plea. Represented by retained counsel, Morejon moves this court for a certificate of

appealability (COA) to appeal the district court's denial of habeas corpus relief.

Morejon argues that his guilty plea was involuntary because trial counsel allowed Morejon to plead guilty without providing adequate guidance. He asserts that counsel failed to evaluate the strength of the State's case and failed to explore potential defenses.

Under *Strickland v. Washington*, 466 U.S. 668, 689-94 (1984), Morejon must show (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced his defense.

In light of the undisputed facts that the complaining witness could not be located until the night before trial; that it was possible that the State would drop the charges if she did not appear to testify; and that the State was agreeable to a continuance if she was found at the last minute, Morejon has failed to show that counsel failed to prepare adequately for his trial. *Strickland*, 466 U.S. at 689. Morejon's conclusional assertion that counsel provided no guidance as to whether he should accept or reject the plea offer is refuted by Morejon's statements in open court at the rearraignment hearing. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

Because Morejon has failed to establish that counsel's actions fell outside "the wide range of reasonable professional assistance," he is not entitled to a COA. *Strickland*, 466 U.S. at 689; *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

COA DENIED.

/s/ Jerry E. Smith
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office Of The Clerk

Charles R. Fulbruge III
Clerk

Tel. 504-310-7700
600 Camp Street
New Orleans, LA 70130

September 18, 2002

Ms. Karen S Mitchell, Clerk
Northern District of Texas, Dallas
United States District Court
1100 Commerce Street
Room 14A20
Dallas, TX 75242

No. 01-10001 Morejon v. Goethals
USDC No. 3:01-CV-1535-G

Enclosed is a certified copy of the judgment issued as the mandate.

Record/original papers/exhibits are returned:
(2) Volumes ( ) Envelopes ( ) Boxes

Sincerely,
CHARLES R. FULBRUGE III, Clerk

By: /s/ Lisa Conrad
Lisa Conrad, Deputy Clerk
504-310-7697

cc: w/encl:
Mr Donald R. Scoggins
Mr. Peter L. Harlan

MDT-1

APPENDIX B

[Filed May 22 2002]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:01-CV-1535-G

JESSE ROBLES MOREJON,

Petitioner,

vs.

RON GOETHALS, Director, Community Supervision and Corrections Department, Dallas County,

Respondent.

CERTIFICATE AS TO APPEALABILITY

A Notice of Appeal has been filed in the above captioned action in which:

(X) the District Court has entered a final order in a habeas corpus proceeding brought pursuant to 28 U.S.C. §2254.

( ) the District Court has entered a final order in a proceeding pursuant to 28 U.S.C. §2255.

Pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. §2253(c), the undersigned Magistrate Judge finds and recommends as follows:

IFP STATUS:

( ) the party appealing should be GRANTED leave to proceed *in forma pauperis.*

( ) the party appealing is proceeding *in forma pauperis.*

( ) the party appealing should be DENIED leave to proceed *in forma pauperis* for the following reason(s):

( ) the Court recommends that the District Court certify, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. §1915(a)(3), that the appeal is not taken in good faith;

( ) the person appealing has not complied with the requirements of Rule 24 of the Federal Rules of Appellate Procedure and/or 28 U.S.C. §1915(a)(1) as ordered by the Court (See Notice of Deficiency and Order filed on _____).

(X) the person appealing is not a pauper; he paid the $105.00 filing fee.

COA:

( ) a Certificate of Appealability should be GRANTED. (See issues set forth below).

(X) a Certificate of Appealability should be DENIED. (See reasons stated below).

REASONS FOR DENIAL: For the reasons stated in the Findings, Conclusions and Recommendation of the United States Magistrate Judge, filed on November 20, 2001, which were adopted by the District Court on December 12, 2001,the Petitioner has failed to demonstrate that

reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel,* 529 U.S. 473, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).

Date: May 20, 2002 /s/ Paul D. Stickney
UNITED STATES MAGISTRATE JUDGE

ORDER OF THE COURT ON
THE FOREGOING RECOMMENDATION

Considering the record in this case and the above recommendation, and pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. §2253(c), the Court hereby finds and orders:

IFP STATUS:

(X) the party appealing is GRANTED *in forma pauperis* status on appeal.

( ) the party appealing is proceeding *in forma pauperis.*

( ) the party appealing is DENIED *in forma pauperis* status on appeal for the following reaons:

( ) the Court certifies, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. §1915(a)(3), that the appeal is not taken in good faith. In support of this finding, the Court adopts and incorporates by reference the Magistrate Judge's Findings and Recommendations enetered in this case on _____ _____. Based upon the Magistrate Judge's findings, this Court finds that the appeal presents no legal points of arguable merit and is therefore

frivolous. *See Harkins v. Roberts*, 935 F. Supp. 871, 873 (S.D. Miss. 1996) (citing *Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983)).

(c) the person appealing has not complied with the requirements of Rule 24 of the Federal Rules of Appellate Procedure and/or 28 U.S.C. §1915(a)-(1) as ordered by the Court. (See Notice of Deficiency and Order filed on ____).

(X) the perosn appealing is not a pauper; he paid the $105.00 filing fee.

COA:

( ) a Certificate of Appealability is GRANTED on the following issues: _____

(X) a Certificate of Appelability is DENIED. The Court hereby adopts and incorporates by reference the Magistrate Judge's Findings and Recommendation entered in this case on November 20, 2001 in support of its finding that Petitioner has failed to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S., 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).

DATE: May 22, 2002

/s/ Jerry E. Smith
UNITED STATES DISTRICT JUDGE

APPENDIX C

[Filed DEC 12, 2001]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:01-CV-1535-G

JESSE ROBLES MOREJON,

Petitioner,

v.

RON GOETHALS, Director, Community Supervision and Corrections Department, Dallas County,

Respondent.

ORDER

After making the review required by 28 U.S.C. §636-(b), the Court finds that the Findings, Conclusions and Recommendation of the Magirstrate Judge are correct, and they are adopted as the findings and conclusions of the Court.

Signed this 12 day of December, 2001.

/s/ A. Joe Fish
UNITED STATES DISTRICT JUDGE

APPENDIX D

[Filed Nov. 20, 2001]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:01-CV-1535-G

JESSE ROBLES MOREJON,

Petitioner,

v.

RON GOETHALS, Director, Community Supervision and Corrections Department, Dallas County,

Respondent.

FINDINGS, CONCLUSIONS AND
RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. §636(b) and an Order of the Court, this case has been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge follow:

I. NATURE OF CASE

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

II. PROCEDURAL BACKGROUND

On September 14, 2001, Petitioner pled guilty to sexual assault in the 265th Judicial District Court, Dallas County, Texas. Pursuant to the plea agreement, the trial court deferred adjudication of guilt, sentenced Petitioner to 150 days in jail, placed him on ten years community supervision and assessed a $500 fine. (Pet. Ex. 1). Petitioner did not appeal from the deferred adjudication order, but instead filed a motion for new trial. (Pet. Ex. 1). In his motion for new trial, Petitioner argued that his attorney rendered ineffective assistance of counsel and that his plea was coerced. (Pet. Ex. 1). On September 20, 2000, after a hearing, the trial court denied Petitioner's motion. (Resp. Mot. Summ. J. at p. 2).

On October 13, 2000, Petitioner filed a state application for habeas corpus again arguing that he received ineffective assistance of counsel and that his plea was coerced. (Pet. at pp. 3-4; Resp. Mot. Summ. J. at p. 2).

On March 8, 2001, in an unpublished opinion, the Court of Appeals for the Fifth District of Texas denied Petitioner's petition for habeas relief. *Ex parte Jesse R. Morejon,* No. 05-01-00065-CR (Tex. App. – Dallas, March 8, 2001, pet. ref'd.). Petitioner also filed a motion for discretionary review which was denied on March 8, 2001. (Pet. at p. 3).

On August 8, 2001, Petitioner filed this federal petition for writ of habeas corpus. Petitioner also filed a Motion to Stay Texas State Court Proceedings. On Aug-

ust 13, 2001, this Court issued an Order to Show Cause to Janie Cockrell, Director, Texas Department of Criminal Justice - Institutional Division ("the Director").

On September 5, 2001, the Court of Appeals for the Fifth District of Texas at Dallas issued a mandate in accordance with the judgment and delivered it to the trial court. On September 12, 2001, Petitioner filed a motion with this Court to order the Texas Fifth District Court of Appeals at Dallas to recall its mandate.

On September 17, 2001, the Director filed a motion to dismiss arguing that Petitioner is not in custody by a state agency, rather, he is in custody of Ron Goethals, Director, Community Supervision and Corrections Department of Dallas County, Texas. On September 26, 2001, the Court granted the Director's motion.

On September 26, 2001, the Court issued an Order to Show Cause to Ron Goethals, Director, Community Supervision and Corrections Department of Dallas County, Texas. The Court also set oral argument for October 3, 2001, on Petitioner's Motion to Stay Texas Court Proceedings and Motion to Order the Texas Fifth District Court of Appeals to Recall its Mandate.

On October 3, 2001, the Court heard oral argument on Petitioner's Motion to Stay and Motion to Order the Texas Fifth District Court of Appeals to Recall its Mandate. The Court granted Petitioner's motion to stay and entered a stay for 45 days from the date of the October 4, 2001, Order. Petitioner was granted until October 16, 2001, to submit any further arguments. Respondent was given until October 30, 2001, to respond to Petitioner's arguments. Petitioner was granted until November 2, 2001, to reply to Respondent's arguments.

III. FACTUAL BACKGROUND

In June, 2000, Petitioner was indicted for sexual assault of his daughter. Petitioner retained counsel and spoke briefly to counsel about the allegations. (Pet. Mem at p. 2). Counsel was told that Petitioner's daughter was not in the country, and it was not believed that she would be present to testify. (Pet. Mem at p. 2). Based on that information, defense counsel spoke to the prosecutor. The prosecutor indicated the case would not go to trial without the daughter, and, if she was found, they would "talk about the case further." (Pet. Mem. at p. 3). The case was set for trial on September 14, 2000.

On the trial date, Petitioner and his wife appeared at the courthouse. Defense counsel asked the prosecutor if there was going to be a trial. The prosecutor informed defense counsel that Petitioner's daughter had been found the day before and she was present to testify. (Pet. Mem. at p. 3). The prosecutor made a plea bargain offer that was open only for that day. (Pet. Mem. at p. 3). The offer was for deferred adjudication probation with ten years community supervision, a $500 fine and 150 days in jail as a condition of probation. (Pet. Mem. at p. 1; Pet. Ex. 1). Defense counsel communicated this plea offer to Petitioner, and told Petitioner that he could either accept the plea offer, or they could reset the trial date and that it would be at least a month before the next trial setting. (Pet. Mem. at p. 3). Petitioner entered into the plea agreement and was sentenced to ten years deferred adjudication probation. (Pet. Mem. at p. 1).

Petitioner then filed a motion for new trial. Petitioner argued at his September 20, 2000, motion for new trial hearing that he was not guilty and that he had told defense counsel that he wanted a trial. (Pet. Mem. at

p. 2). Petitioner claimed that he felt compelled to plead guilty because trial counsel told him he would no longer represent him if he did not plead guilty. Petitioner also stated that other "family circumstances" led him to plead guilty. (Pet. Mem. at p. 3). The trial court denied the motion for new trial.

On October 13, 2000, Petitioner filed a state application for writ of habeas corpus with the trial court. (Pet. Mem at p. 2). Petitioner made two claims in his petition. First, he argued his plea of guilty was not freely and voluntarily made because his trial counsel threatened, frightened and intimidated Petitioner into pleading guilty when he would have otherwise insisted on a trial. Second, Petitioner argued he was denied the effective assistance of counsel because his counsel advised him to plead guilty without acquainting himself with the law and the facts of the case. (Pet. at 4). After a hearing, the trial court denied this petition. (Pet. Ex. 1 at p. 6). Petitioner then appealed to Texas Fifth District Court of Appeals, Dallas, Texas. The Court of Appeals affirmed the trial court's decisition to deny Petitioner's petition for habeas relief. *Ex parte Jesse R. Morejon,* No. 05-01-00065-CR (Tex. App. – Dallas, March 8, 2001, pet. ref'd).

On August 8, 2001, Petitioner filed a federal petition for writ of habeas corpus in this Court. Petitioner argues one ground for relief.[1] He argues that he received ineffective assistance of counsel because his counsel's lack of preparation and familiarity with the facts of the case fell outside the acceptable range of competence, and but for his counsel's error, he would not have pled guilty.

---

[1] Although Petitioner argued in his State court petition that his plea was coerced, he does not argue this point in his federal petition.

(Pet. at p. 7). Petitioner claims his trial counsel erred by (1) failing to interview witnesses who could have testified for Petitioner regarding his relationship with his daughter and her failure to make outcry; (2) failing to investigate the facts of an argument between Petitioner and his daughter. Petitioner claims this disagreement could have been the basis for her alleged false report of sexual assault; (3) failing to object and investigate the fact that on the indictment date Petitioner's daughter was missing, so that Petitioner could not have sexually assaulted her on that date; and (4) failing to attempt to contact Petitioner's daughter and interview her.

IV. DISCUSSION

The pertinent terms of the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA), 28 U.S.C. §2254 provide:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the the judgment of a state court shall not be granted with respect to any claim that was adjudicated the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

28 U.S.C. §2254(d). Under the "contrary to" clause, a federal habeas court may grant the writ of habeas corpus

if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 380-84 (2000). Under the "unreasonable application" clause, a federal court may grant a writ of habeas corpus if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 307.

This amendment applies to all federal habeas corpus petitions which are adjudicated on the merits in state court after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 336, 117 S.Ct. 2049 (1997). The petition in this case is subject to review under the AEDPA.

1. Presumption of correctness.

Under 28 U.S.C. §2254(d), a presumption of correctness must be accorded findings of fact made by a state habeas court if supported by the record. *Armstead v. Scott*, 37 F.3d 202, 206 (5th Cir. 1994) (citation omitted). Although an ineffective assistance of counsel claim is not purely a fact inquiry, but rather a mixed question of law and fact, "state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of §2254(d)." *Id.* Petitioner claims that the state court findings should not be accorded deference because the state trial court did not address Petitioner's ineffective assistance of counsel claim. Petitioner points to the trial court's statement on the record that "I don't feel like [the guilty plea] was coerced and

I don't feel like it was forced in any way. And for that reason, I will deny the writ." (Pet. Ex. 2 at p. 42). The record, however, clearly shows that Petitioner raised before the state trial court the same allegations of ineffective assistance of counsel that he raises here. The trial court held a hearing on these claims and heard testimony. The trial court then denied Petitioner's habeas corpus petition. The Texas Fifth District Court of Appeals found that the trial court addressed Petitioner's ineffective assistance of counsel claims. The Court of Appeals affirmed the trial court's denial of habeas relief. This Court will give deference to the State court's findings of fact where they are supported by the record. *Armstead,* 37 F.3d at 206.

2. Ineffective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, a petitioner must satisfy the two-prong test enunciated in *Strickland v. Washington,* 466 U.S. 668 (1984). Petitioner must show that his counsel's performance was deficient and that the deficiency prejudiced his defense. *Strickland,* 466 U.S. at 694. In the context of a guilty plea, a petitioner must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. 52, 59 (1985).

In regard to the performance prong of the *Strickland/Hill* test, if a defendant is represented by counsel and pleads guilty upon advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. *Armstead v. Scott,* 37 F.3d 202, 206 (5th Cir. 1994) (citations omitted). In regard to the

prejudice prong, a petitioner must prove that but for his counsel's allegedly incorrect advice, he would have insisted on going to trial. *Id.* Whether the petitioner is able to make a persuasive argument that he was prejudiced depends partly on his chances for success at trial. *See Magnum v. Hargett,* 67 F.3d 80, 84 (5th Cir. 1995). If the petitioner claims that counsel erred by failing to investigate or discover certain exculpatory evidence, the prejudice determination will depend upon whether the discovery of such evidence would have influenced counsel to change is advice regarding the guilty plea. *Magnum,* 67 F.3d at 84. Whether counsel would have changed his advice depends on his preduction whether the evidence would change the outcome of the trial. *Magnum,* 67 F.3d at 84 (citing *Armstead v. Scott,* 37 F.3d 202 (5th Cir. 1994)).

(a) Indictment Date

Petitioner argues that his wife informed counsel that Petitioner could not have committed the alleged sexual abuse on the date charged in the indictment. (Pet. Mem. at p. 6). Petitioner states that he and his wife informed counsel his daughter was a missing person on that date. The record shows a missing persons report was filed by Petitioner on February 28, 2000. Although neither side submitted a copy of the indictment, it appears from the Judicial Confession, that the indictment date was February 29, 2000. (Pet. Ex. 2 at p. 59). Under Texas law, the "on or about" language of an indictment allows the State to prove a date other than that alleged in the indictment, as long as the date is before the presentment of indictment and within the statute of limitations. *See*

Sledge v. State of Texas, 953 S.W.2d 253, 255-56 (Tex. Crim. App. 1997) (en banc). The allegations in this case occurred in February, 2000. The indictment was in June, 2000. Therefore, the allegations preceded presentment of the indictment. The statute of limitations for sexual assault is ten years from the victim's eighteenth birthday. (Tex. C.C.P. art. 12.01). The Court therefore finds no error by trial counsel in failing to object or further investigate the indictment date.

(b) Petitioner's argument with his daughter.

Petitioner argues that his counsel failed to investigate the facts of an argument between Petitioner and his daughter. Petitioner claims this disagreement with his daughter could have been the basis for her alleged false report of sexual assault. Petitioner argues that trial counsel failed to investigate the facts of this argument and failed to obtain Garland City Police records showing that Petitioner was arrested on February 26, 2000, for family violence assault against his daughter. It is clear from the record, however, that Petitioner informed trial counsel of these facts and his belief that they undermined his daughter's credibility. Counsel testified at the habeas corpus hearing that Petitioner "basically stated [to counsel] that he believed his daughter was trying to get back at him because he didn't – because he didn't approve of the relationship that his daughter had with another gentleman." (Pet. Ex. 2 at p. 24). Petitioner has not shown that counsel's failure to obtain the arrest record caused counsel's representation to fall below the range of competence demanded of attorneys in criminal cases. *Armstead*, 37 F.3d at 206. The Court is also unable to conclude that the report was actually exculpatory. Even assuming,

arguendo, that counsel erred in not obtaining the arrest report, Petitioner has not shown the required prejudice. Petitioner has not shown that a review of the Garland arrest record would have caused counsel to advise Petitioner not to enter a guilty plea. Additionally, Petitioner has provided no information regarding what evidence, besides the arrest report, a further investigation would have uncovered.

(c) Counsel's failure to locate or interview Petitioner's daughter.

Petitioner argues counsel's investigation was deficient because he made no effort to contact Petitioner's daughter, even though Petitioner's previous attorney obtained two affidavits of non-prosecution from her. The record shows that prior to trial, the daughter was a missing person. The prosecutor informed counsel that if the daughter was not found, the State would not go forward with a trial. It is not outside the range of competence demanded by attorneys in criminal cases to place the burden of finding the complaining witness on the State.[2] Further, although Petitioner complains that counsel did not interview the daughter on the day of trial, Petitioner has submitted no evidence, nor has he argued, that the daughter's testimony would have been inconsistent with the indictment. Petitioner has therefore failed to show he has suffered any prejudice from counsel's failure to locate his daughter prior to trial, or to interview her the day of trial.

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[2] Although the daughter signed two affidavit of non-prosecution from Petitioner's first attorney, the prosecutor refused to accept these affidavits because they stated only that the daughter did not want to come to court, and that she wanted to forget about the case, not that Petitioner did not commit sexual assault.

(d) Counsel's failure to interview witnesses.

Petitioner argues that counsel failed to interview witnesses "made known to him" who could have testified about Petitioner's relationship with his daughter. (Pet. at p. 7). At the December 15, 2000, state habeas hearing, Petitioner read into the record the affidavits of Angel Alejo, Fermin Fernandez and Gracie Solis. (Pet. Ex. 2 at pp. 15-17, 22-24.) Mr. Alejo's affidavit stated that he has know Petitioner for approximately 13 years, that he spent extensive time around Petitioner and his daughter and that Petitioner's daughter was very happy. Mr. Fernandez's affidavit stated that he has known Petitioner approximately 20 years and that there was a good father-daughter relationship between Petitioner and his daughter. The affidavit of Ms. Solis stated that she has known Petitioner for approximately 18 years and that his daughter often visited her home. Ms. Solis' affidavit stated that the daughter told Ms. Solis that he was upset because Petitioner spanked her when he caught her in a car with her boyfriend. Ms. Solis stated she asked the daughter whether anything else was wrong, and the daughter told her no. Each of these affiants stated that would have been willing to testify at trial.

Petitioner's witnesses were either character witnesses or would have testified that they knew Petitioner and his daughter and were aware of no sexual abuse. None had actual knowledge of the event surrounding the charges. Juxtaposed to Petitioner's witnesses, was the alleged victim of the sexual assault whom the record reflects was prepared to testify that the sexual assault occurred. Petitioner has not shown that had counsel interviewed these witnesses, their proposed testimony would have caused him to recommend against pleading guilty.

It is clear that counsel was aware of Petitioner's version of the events, and that Petitioner had character witnesses to testify on his behalf. Petitioner has not persuaded this Court that any further investigation by counsel would have caused counsel to recommend that Petitioner plead not guilty. Assuming *arguendo* that counsel did not sufficiently investigate the case and that such conduct constituted deficient performance, Petitioner has not shown a reasonable probability that but for counsel's allegedly erroneous advice, he would have insisted on going to trial. *Hill,* 474 U.S. at 59.

The record indicates that if convicted of sexual assault, Petitioner was facing a possible sentence of two to twenty years in the penitentiary, and a fine of up to $10,000. The trial would have likely consisted of a credibility determination between Petitioner and his daughter regarding sexual assault. In fact, Petitioner requested from his trial counsel and the court that he be allowed to hear his daughter's testimony before deciding whether to plead guilty. (Pet. Ex. 2 at p. 37). This request was denied. By pleading guilty, Petitioner received a sentence far less than the statutory minimum. The Court finds that trial counsel acted reasonably and that Petitioner did not suffer the required "appreciable prejudice" to render his counsel ineffective. *See Lockhart v. Fretwell,* 506 U.S. 364 (1993).

CONCLUSION

The State court's finding that counsel was not ineffective is supported by the record. Petitioner has failed to overcome the presumption that his counsel made all significant decisions in the exercise of reasonable professional judgment. *Strickland,* 466 U.S. at 690. He has not shown that but for errors in his counsel's perform-

ance, he would have insisted on going to trial. *Hill*, 474 U.S. at 59. His double failure to show deficient performance and prejudice defeats his claim of constitutionally ineffective assistance of counsel. The state court decision to deny habeas relief is not contrary, to, or did not involve and reasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Accordingly, the petition for writ of habeas corpus should be denied.

RECOMMENDATION

Petitioner has failed to make a substantial showing of the denial of a federal right. The petition for writ of habeas corpus should be denied.

Signed this 20th day of November, 2001.

/s/ Paul D. Stickney
PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

June 27, 2001
COA#: 05-01-00065-CR
RE: Case No. 0648-01
STYLE: MOREJON, EX PARTE JESSE ROBLES
On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

AUSTIN TX JUN 27 01 7212044 =020= U.S. POSTAGE

DONALD R SCOGGINS
1600 PACIFIC AVE SUITE 2400
DALLAS TX 75201

01

APPENDIX E

APPENDIX F

[Filed March 8, 2001]

[SEAL]

IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-01-00065-CR

EX PARTE JESSE R. MOREJON
a/k/a JESUS ROBLES MOREJON

On Appeal from the 265th Judicial District Court
Dallas County, Texas
Trial Court Cause No. WX00-04567-R

OPINION

Before Justices Whittington, Bridges, and Roach
Opinion By Justice Roach

Jesse R. Morejon pleaded guilty to sexual assault. Pursuant to the plea bargain agreement, the trial court deferred adjudication of guilt, placed appellate on ten years community supervision, and assessed a $500 fine. Appellant filed a motion for new trial, but did not appeal from the deferred adjudication order. He subsequently filed an application for writ of habeas corpus seeking to have his plea set aside. Following a hearing,

the trial court denied appellant the relief he sought. This appeal followed.[1] In two points of error, appellant complains trial counsel rendered ineffective assitance and his plea was coerced.

BACKGROUND

Appellant was indicted for the sexual assault of his daughter Z.M., which was alleged to have occurred on February 29, 2000. Appellant contacted Robert Berry, an attorney appellant knew. Berry did not handle criminal cases, but agreed to help appellant find counsel who did. Appellant initially met with an attorney who would not agree to represent appellant in a contested trial. Thereafter, appellant and Berry met with Alexander Fitzhagen, the attorney who ultimately represented appellant in the underlying proceedings. They agreed Fitzhagen would represent appellant in a trial before the court.

The case was set for trial on September 14, 2000. On the morning of September 14, 2000, appellant and his wife, Donya Delmar, appeared at the courthouse for the trial. Fitzhagen learned that Z.M., who had previously been missing, had been located and was present to testify. After the prosecutor interviewed Z.M., he made Fitzhagen a plea bargain offer of deferred adjudication. Fitzhagen communicated the offer, which was only good for that day, to appellant. Later that afternoon, appellant entered into the plea bargain agreement and received ten years deferred adjudication probation.

The record of the plea hearing reflects appellant was admonished in accordance with article 26.13 of the

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[1] *See Ex parte McCullough*, 966 S.W.2d 529 (Tex. Crim. App. 1998).

Texas Code of Criminal Procedure.[2] Appellant testified he understood the papers he signed. He further stated he was pleading guilty freely and voluntarily – no one had threatened or coerced him into entering the plea. Appellant testified he and Fitzhagen had spent the morning discussing the plea offer, and, after "painstaking discussion and agonizing over the decision," appellant chose to plead guilty.

At the September 20, 2000 motion for new trial hearing, appellant and Delmar testified they had always insisted appellant was not guilty and wanted to go to trial. Although Z.M. had lived with appellant and Delmar, Z.M. had run away from home prior to the date of the alleged offense, and her whereabouts had not been know. Delmar testified Fitzhagen never wanted to talk about the facts of the case.

Appellant testified Fitzhagen said they would wait to see if the State could produce Z.M., then get a postponement and go to trial. Z.M. was located the day before trial. Although appellant and Delmar still wanted to take the case to trial, Fitzhagen did not want to go to trial now that Z.M. had been located. Fitzhagen told appellant he go could to jail for five to ten years if appellant did not accept the plea offered. Delmar, however, advised appellant not to sign the papers because they were not true – Z.M. was not in the home on the date of the alleged offense. When appellant persisted in his

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[2]The clerk's record does not contain a copy of written admonishments. However, the trial court orally admonished appellant on the punishment range. Moreover, the judgment recites appellant received admonishments. *See Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1984) (op. on reh'g) (presumption of regularity).

demand for a trial, Fitzhagen became angry and said, "he was not going to go back and forth, [appellant] was not going to embarrass him, and [Fitzhagen] was not going to represent [appellant]." Fitzhagen threw the plea papers in the trash, left the room, went to cash the fee check, then returned. Appellant called Berry in a panic, and Berry advised appellant not to plead. Appellant testified he felt compelled to plead guilty due to family circumstances and the fear that Fitzhagen would not represent him. Appellant signed the plea papers, and answered "yes" to the judge's questions because that is what Fitzhagen told him to say.

The trial court denied the motion for new trial, but stated the record would be preserved in the event appellant wanted to file an application for writ of habeas corpus. Appellant filed an application for writ of habeas corpus on October 13, 2000, again challenging the voluntariness of his plea. In addition to the evidence presented at the habeas hearing, the trial court considered the record of the plea and motion for new trial hearings.

Fitzhagen testified he had been retained to represent appellant on a sexual assault charge. The case was referred to Fitzhagen from Berry. Fitzhagen had never tried a sexual assault case to a jury, but had tried one to the court. There was an agreement as to the attorney's fee for representing appellant in a trial before the court. Fitzhagen and appellant briefly discussed the allegations, who Z.M. was and whether she was believed to be in the country. Fitzhagen was told that Z.M. was not in the country and it was not believed she would be present to testify. Based on that information, Fitzhagen spoke with the prosecutor about the case. The case was eventually passed for trial on September 14, 2000.

Before the trial date, Fitzhagen had spoken with appellant about potential witnesses. They had not gone into detail because the prosecutor had indicated the case would not go to trial without Z.M., and, if she was found, they would "talk about the case further." Fitzhagen was initially offered a plea bargain to "some kind of TDC time." He did not recall whether he discussed it with appellant. Fitzhagen knew, however, that appellant wanted to plead not guilty and have a trial.

On September 14, Fitzhagen asked the prosecutor if there was going to be a trial. Fitzhagen learned Z.M. had been located the day before and was present to testify. After the prosecutor spoke with Z.M., he made another plea bargain offer. Fitzhagen communicated the offer, which was only good for that day, to appellant. Fitzhagen testified he had two affidavits of nonprosecution signed by Z.M. The prosecutor was not willing to accept the affidavits, however, because they were not produced by the District Attorney's office. Further, the affidavits did not state no offense occurred, and Z.M. was willing to testify at trial. Fitzhagen also testified he had an "understanding" with the prosecutor that the case would not go to trial if there was no complaining witness, and it probably would not go to trial on the date scheduled. Later on September 14, the prosecutor "guaranteed" the case was not going to trial that day.

During Fitzhagen's testimony, appellant introduced the affidavits of Angel Alejo, Fermin Fernandez, and Gracie Solis. The affidavits of Alejo and Fernandez stated that appellant and Z.M. appeared to have a good father-daughter relationship. Fernandez's affidavit further stated he saw nothing to suggest any improper sexual conduct. Solis's affidavit stated that Z.M. and appellant would come to her home together. Later, when

Z.M. began coming alone, Solis asked about her father. Z.M. stated appellant had spanked her because he caught her in the car with her boyfriend. Solis opened her home to Z.M., without the boyfriend, but Z.M. chose not to live with Solis. Each of the affidavits stated the witnesses were available to testify if called.

Fitzhagen testified he was not aware of these statements. Nor did he have the missing persons report filed on Z.M. Further, Fitzhagen did not file any pretrial motions. However, at the time appellant was considering the plea bargain offer, they knew the case was not going to trial on that day. Fitzhagen told appellant there were still issues in the case and they could go to trial. Appellant knew that it would be at least a month before the trial was reset, and Fitzhagen told appellant they could talk to any witnesses and bring any witnesses appellant wanted to court. Fitzhagen did not counsel appellant to plead guilty. Rather, he informed appellant of the options and told appellant the decision of whether to plead guilty was ultimately appellant's to make.

Appellant also introduced Berry's affidavit into evidence. In the affidavit, Berry stated he and appellant met with Fitzhagen regarding representation. Fitzhagen agreed to handle the case, and it was clear there would be no plea bargain because appellant was not guilty. The next Berry heard of the proceedings was on September 14, when he received a panicky voice mail message from appellant stating appellant was at the courthouse and Fitzhgen was scaring him and trying to make him plead guilty. Berry called appellant's home and left a message for him not to plead guilty. Berry then called Fitzhagen's office and left a voice mail message telling Fitzhagen not to force appellant to plead guilty because

appellant was not guilty and the agreement was to take the case to trial. Fitzhagen returned the call between 3:30 and 4:00 that afternoon, and stated that it had taken almost all day, but appellant had pleaded guilty. When Berry reminded Fitzhagen of the terms of the agreement, Fitzhagen became angry and told Berry "this is no longer your case." Berry finally stated that it was his belief appellant would not have pleaded guilty unless he was frightened and coerced into entering the plea.

Fitzhagen testified he did tell Berry they had pleaded the case. The conversation took place around 3:30 or 4:00 that afternoon. Further, appellant never told him he did not want to plead guilty, and, although he was retained to try the case, it is not uncommon for individuals to appear on the day of trial and decide to plead guilty instead. Finally, Fitzhagen testified he and appellant discussed the matters raised in the habeas proceeding, and the possibility that if the case went to trial, appellant might be found not guilty. However, appellant also had a plea bargain offer, and Fitzhagen told appellant he needed to "weigh whether or not he wanted to take that plea bargain or go to trial and take the chance of whether he'd be found guilty or not." That afternoon, appellant chose to plead guilty. Fitzhagen in no way coerced or forced appellant to do that. Further, Fitzhagen testified he did not angrily throw the documents into the trash can because he was disgusted with appellant. And, Fitzhagen testified, he cashed appellant's fee check after Fitzhagen left the courthouse for the day.

At the conclusion of the hearing, the trial judge denied appellant the relief he was seeking.

STANDARD OF REVIEW

Appellant has the burden in a writ of habeas corpus proceeding to prove his allegations by a preponderance of the evidence. *See Ex parte Lafon*, 977 S.W.2d 865, 867 (Tex. App. – Dallas 1998, no pet.). In reviewing the trial court's decision, we view the evidence in the light most favorable to the ruling and accord great deference to the trial court's findings and conclusions. *Id.* Absent a clear abuse of discretion, we accept the trial court's decision whether to grant the relief requested in a habeas corpus application. *Id.*

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first point of error, appellant complains Fitzhagen provided ineffective assistance because he was not prepared and lacked familiarity with the facts of the case. Specifically appellant complains counsel did not investigate: (1) potential witnesses who could appear on appellant's behalf; (2) a discrepancy in the date of the alleged offense and Z.M.'s status as a missing person on that date; and (3) assertions that Z.M. was angry with appellant because of an altercation that took place on a date prior to the alleged offense. The essence of appellant's complaint is that because counsel had not prepared in these areas, he could not adequately advise appellant on whether to accept the guilty plea.

In Texas, a defendant is entitled to reasonably effective assistance of counsel. *See Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986); *Melton v. State*, 987 S.W.2d 72, 75 (Tex. App. – Dallas 1998, no pet.). To establish an ineffective assistance of counsel claim, appellant must show that counsel's representation fell below an objective standard of reasonableness and counsel's deficient performance resulted in prejudice

to the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ex parte Lemke*, 13 S.W.3d 791, 795 (Tex. Crim. App. 2000). In the context of the guilty plea, appellant must show there is a reasonable probability that, but for counsel's errors, appellant would not have pleaded guilty, but would have insisted upon going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Ex parte Moody*, 991 S.W.2d 856, 858 (Tex. Crim. App. 1999). We determine whether the *Strickland* standard has been met by judging the totality of the circumstances, and we apply the test at the time of trial, not through hindsight. *See Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990).

Counsel must have a firm command of the facts of the case as well as the law before he can render effective assistance of counsel. *Butler v. State*, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986). *Ex parte Lilly*, 656 S.W.2d 490, 493 (Tex. Crim. App. 1983). Among counsel's duties is that of making an independent investigation of the facts of his client's case. *See Butler*, 716 S.W.2d at 54; *see also Ex parte Welborn*, 785 S.W.2d at 393. Ordinarily, counsel should not rely blindly on the veracity either of his client's version of the facts or the witness statements in the State's file. *See McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996) (per curiam). However, the duty to investigate is not categorical. *Id.* Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particularly investigations unnecessary. *Id.* (citing *Strickland*, 466 U.S. at 691).

Fitzhagen admitted he was not prepared to go to trial on September 14 and had not interviewed the witnesses appellant mentioned. He testified, however, that he knew the case was not going to trial that day. Fitz-

hagen further testified he was familiar with the case through his discussions with appellant. *See id.* He knew appellant wanted to go to trial; but he also had an obligation to inform appellant of the plea bargain agreement. *See Ex parte Wilson*, 724 S.W.2d 72, 73-74 (Tex. Crim. App. 1987). The decision of whether to plead guilty was appellant's. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983). Fitzhagen had the duty to ascertain that the plea was knowing and voluntary. *See Butler v. State*, 499 S.W.2d 136, 139 (Tex. Crim. App. 1973). Fitzhagen presented appellant's options to him – to refuse the plea and have a trial on another day or to accept the plea bargain offer. Appellant chose to plead guilty.

Having reviewed the record in the light most favorable to the trial court's ruling, we conclude appellant has not met his burden of showing Fitzhagen's representation fell below an objective standard of reasonableness. Accordingly, we overrule appellant's first point of error.

COERCED PLEA

In his second point of error, appellant complains his plea was involuntary because Fitzhagen coerced him into entering the plea. Appellant complains he was put in the position of accepting the plea agreement and pleading guilty or being left without counsel.

No plea of guilty may be accepted by the court unless it appears the plea is free and voluntary. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon 1989). A declaration of guilt made under compulsion, duress, or coercion is not a plea. *George v. State*, 20 S.W.3d 130, 133 (Tex. App. – Houston [14th Dist.] 2000, pet. filed). Proper admonishments by the trial court create a prima facie showing that the guilty plea was knowing and voluntary. *See Ex parte Gibauitch*, 688 S.W.2d 868, 871

(Tex. Crim. App. 1985). The appellant then has the burden of showing he did not understand the consequences of his plea. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(c) (Vernon 1989). Moreover, when an appellant affirmatively indicates at the plea hearing that he understands the nature of the proceeding and is pleading guilty because the allegations in the indictment are true, and not because of any outside pressure or influence, he bears a heavy burden to prove the plea was involuntary. *See George,* 20 S.W.3d at 135. We determine the voluntariness of the plea based on the totality of the circumstances surrounding the plea. *See Griffin v. State,* 703 S.W.2d 193, 195 (Tex. Crim. App. 1986); *Ex parte Lafon,* 977 S.W.2d at 867.

In this case, there was conflicting evidence regarding whether Fitzhagen coerced appellant into pleading guilty. The record of the plea hearing reflects appellant was admonished in accordance with article 26.13. Appellant affirmed to the trial court that he understood the papers he had reviewed, he was pleading guilty freely and voluntarily, and no one forced him to plead guilty. Appellant and Delmar testified at the motion for new trial hearing that Fitzhagen pressured appellant and essentially threatened to not represent appellant if he did not accept the plea bargain. Appellant responded, "yes" to the trial court's questions because that is what Fitzhagen told him to do. Berry's affidavit stated appellant called him in a panic, asserting Fitzhagen was trying to force him to plead guilty. Fitzhagen testified he did not coerce appellant or threaten to withdraw from representing him. Rather, Fitzhagen testified, he presented appellant with his options and appellant ultimately chose to plead guilty.

It was the trial court's role to resolve the conflicts in the evidence. *See Ex parte Lafon,* 977 S.W.2d at 868.

In doing so, the trial court recognized that appellant was faced with a tough decision in determining whether to enter his guilty plea. The trial court concluded appellant's plea was not coerced or involuntary. Having reviewed the record, we cannot conclude the trial court abused its discretion in reaching this conclusion. Accordingly, we overrule appellant's second point of error.

Having resolved appellant's two points of error against him, we affirm the trial court's order denying appellant the relief he sought by his application for writ of habeas corpus.

/s/ John R. Roach
JOHN R. ROACH
JUSTICE

Do Not Publish
TEX R. APP. P. 47

APPENDIX G

[Filed Jan 16 2001]

APPEALS COURT NO. 05-00- CR

REPORTER'S RECORD
VOLUME ONE OF ONE VOLUME
TRIAL COURT CAUSE NO. F00-23348-R

(WRIT NO. WX00-04567-R)

265TH JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS
JULY TERM, A.D. 2000

EX PARTE
JESSE ROBLES MOREJON

(HEARING ON APPLICATION FOR WRIT OF HABEAS CORPUS)

On the 15th day of December, 2000, the following proceedings came on to be heard in the above-titled and numbered cause before the HONORABLE COURT, KEITH DEAN, JUDGE Presiding, held in Dallas, Dallas County, Texas.

(Proceedings reported by
CAT MACHINE SHORTHAND Method.)

beverly e. dixon, official court reporter (214) 653-5843

* * *

[40] STATE'S CLOSING STATEMENT

BY MS. WISE:

Your Honor, there has been no coercion shown in this case. The defense attorney, Mr. Fitzhagen, carefully counseled the defendant as to his options, gave him the right as he had as the defendant in this case to decide whether he wanted to accept a plea bargain offer that was a very good offer in a case such as this, or go to trial at a later date. The defendant was allowed to think about this for hours, the defense attorney did not coerce him in to taking the plea, but the defendant made the decision to take the plea.

The fact that the defendant now apparently wishes he had made a different decision does not mean that the plea was involuntary and does not mean that his counsel was ineffective for allowing him to consider the plea and taking the plea.

State submits that this Writ should be denied.

THE COURT: Having heard the evidence and arguments in the hearing, having reviewed all of the exhibits presented, and I recall the hearing itself, the plea itself, because it was a plea that took a while and went back and forth. I saw the lawyers discussing it on several occasions [41] that day.

I honestly believe that the whole case could be summed up on Page 7 of the transcript of the guilty plea. Lines 21 through 25, where the question was asked: "And you're decided, after painstaking discussion and agonizing over the decision, you have decide[d] to present yourself in front of the Judge today and [p]lead guilty and accept the plea bargaining agreement that I've worked out for you; is that correct?"

And the answer on the next page, Line 1, is "Yes, sir."

I think it was a difficult decision, one of those decisions almost impossible decision, that later Mr. Morejon on further reflection thought, I should have done something else. But I don't feel like it was coerced and I don't feel like it was forced in any way. And for that reason, I will deny the Writ.

(END OF PROCEEDINGS.)